Supreme Court of the United States

OCTOBER TERM, 1951—No. 522

JOSEPH BURSTYN, INC.,

Appellant,

against

LEWIS A. WILSON, Commissioner of Education of the State of New York, *et al.*

REPLY BRIEF FOR APPELLANT.

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APPELLANT'S REPLY BRIEF.

Unsupported Statements in the Appellees' Brief.

A reading of the brief submitted by the Appellees (the Regents) might lead one to believe that there "was a rising storm of protest" over the showing of "The Miracle," and that the Regents were inundated with communications all indicating "a strong feeling by the public that the film was sacrilegious" (Appellees' brief pp. 5-6, 51). The Record does not reveal any strong public feeling that the film was sacrilegious; on the contrary the strong public feeling shown by the record was against the banning of the film (R. 95-141). The communications received by the Regents are not part of the Record. The specific references to their content (Appellees' brief pp. 5, 51) are, therefore, not proper. Moreover, as the counsel for the Appellees stipulated, those "communications were on *both sides* of the question" (R. 86).

Reference is also made in the Appellees' Statement of The Facts to various notices sent by the License Commis-

sioner of the City of New York, and to other occurrences said to be the subject matter of another action, *Burstyn Inc.* v. *McCaffrey*. Although page 49 of the Record is cited as the page where the facts are reported (Appellees' brief p. 5), they are not reported at that page or at any other page of the Record.

The Regents' statement with respect to the effect of the film censorship statute is not entirely accurate. Their brief, in attempting to minimize the effect of the statute, states, at page 3, "Thus, the only required examination of motion pictures, under the statute, is of those which are to be shown *for entertainment purposes* in public theatres where admission fees are to be charged." (Emphasis supplied.) The statute provides for the issuance of *licenses* only after the films have been examined and approved (Education Law, §122, Appellant's Brief, p. 48). Under the statute *permits* may, in the discretion of the director of the Motion Picture Division, be issued for educational and religious films without prior examination. But the Regulations promulgated by the Regents prevent the exercise of that discretion. Section 244 of the Regents Regulations provides that a permit shall not be granted for any film that does not meet the statutory standards (Appellant's Main Brief p. 54). Obviously a film must be examined before it can be approved as not "obscene, indecent, etc." The statute requires the issuance of a permit without prior examination only for scientific and educational films, shown only to members of the learned professions, and provided the films are not shown in a public or private theater (Education Law §123(2), Appellant's Main Brief p. 48). (Permits granted without examination, even for such limited purposes, may be revoked without a hearing (Education Law, §125, Appellant's Main Brief p. 49.))

It may thus be stated that, under the law as interpreted and enforced by the Regents, *all films shown in public theaters, except news reels, must first be examined and approved by the Motion Picture Division.*

Relying upon their own unpublished files as authority, the Regents declare, at pages 39-40 of their brief, that the representatives of the public support the film censorship law and "the Motion Picture Industry itself has never sponsored or advocated repeal." Those conclusions are entirely unwarranted. It is common knowledge that the Motion Picture Industry is opposed to film licensing statutes. The Motion Picture Association of America (MPAA), representing all the major film producers in the United States, has several times sought an adjudication that film licensing laws are unconstitutional. The MPAA is seeking such a determination from this Court at the present time in *W. L. Gelling* v. *State of Texas* (October Term, 1951, Docket No. 707). The International Motion Picture Organization is party to the *amicus* brief supporting the Appellant's position in this case and public opinion, as reflected in the newspapers and in radio broadcasts, is opposed to film censorship (R. 109-114).

At page 51 of their brief, Appellees state, "In 'The Miracle' the Virgin is crowned with a dishpan and flowers are flung at her in mock tribute." The Virgin Mary is not portrayed in the film, and none of the characters are in any way identified with her. The picture merely portrays the delusions of a feeble-minded woman who meets and is impregnated by a stranger she believes to be St. Joseph. The Appellees insist that the story is allegorical, that the woman symbolizes the Blessed Virgin, and that the film suggests that Jesus was carnally and not divinely conceived. As the record clearly indicates, that was not the intent of those who produced, directed and acted in the film, nor is

it the interpretation of the great majority of those qualified to judge on religious matters, (see pp. 5-7 of Appellant's Main Brief). If the Regents chose to identify the principal character in the film with the Virgin, and to identify her illegitimate child with Jesus, then the "sacrilege" lies in their interpretation and not in the film.

At page 48 of their brief, the Regents quote from the majority opinion of the Court of Appeals of New York dismissing the statements of the many clergymen, professors, educators, editors and writers submitted to the Regents and made part of the Record in this case (R. 95-141), as expressions of "personal opinions . . . of little help to us" (R. 152). It is the usual practice in New York State to submit opinions of qualified persons in censorship cases. *People* v. *Larsen*, 5 N. Y. S. 2d 55; *People* v. *Viking Press*, 147 Misc. 813; *People* v. *Gotham*, 285 N. Y. S. 563. The Court of Appeals followed that practice in *Halsey* v. *New York Soc. for Suppression of Vice*, 234 N. Y. 1. Moreover, the Regents' intimation that the Exhibits are not worthy of consideration comes with ill grace in view of their ruling against oral testimony, which in effect restricted the Appellant to the submission of such statements (R. 27, 56-57).

Great stress is placed in the Regents' brief (at pp. 20-27) on the fact that production and exhibition of motion pictures are commercial enterprises, and that the producers of pictures emphasize the entertainment aspects. Copies of advertisements in the New York Times are appended to the brief to demonstrate that emphasis. The quality of the advertisements does not, however, affect the nature of the product. The films advertised include Victor Hugo's *Les Miserables;* George Bernard Shaw's *Caesar and Cleapatra;* T. S. Eliot's *Murder in the Cathedral; Nature's Half Acre*

(a documentary showing the seasonal changes in animal and plant life on a half acre of ground); *Kon-Tiki* (a documentary account of a voyage on a raft across the Pacific, made to prove the migration of Incas to the South Sea Islands); *Royal Journey* (a documentary account of Princess Elizabeth's Good-Will Tours); *It's A Big Country* (which begins with the spoken words, "This is a message picture. Its message is 'hooray for America'.") *Passion for Life* (revealing the methods of 'progressive education'); *My Son John* (showing the effect of communism on a family relationship); *Viva Zapata* (a study of the Mexican peasant revolutionary); *Anything Can Happen* (the story of the adventures of an immigrant learning the American way of life); *The Marrying Kind* (an account of the problems of frustration in marriage that lead to the Domestic Relations Court); *Mr. Lord Says No* (a satire on bureaucracy); *For Men Only* (an indictment of hazing in college fraternities); *Rashomon* (an incident as narrated by several different people, demonstrating that each person's understanding of truth is to his own advantage); *Death of a Salesman* (depicting the false worship of material success); *The River* (a semi-documentary of the river Ganges, showing the ceremonies and festivals of the people); *King Solomon's Mines* (which also employs the documentary technique to show animal and tribal life in Africa).

However the films may be sold, it is clear that they report, inform, educate, provoke thought and express ideas. It is absurd to contend that motion pictures are not a medium of communication because they also entertain. As this Court pointed out in *Winters* v. *New York*, 333 U. S. 507, 510, it is impossible to draw a line between informing and entertaining. Every great dramatist from Aristophanes

to George Bernard Shaw, every great novelist from Cervantes to Huxley, every great satirist from Horace to Beerbohm, has simultaneously informed and entertained.

Appellant is not Estopped from Challenging the Validity of the Film Censorship Statute.

The Regents argue (at p. 64 of their brief) that, since the Distributor-Appellant obtained a license for the exhibition of "The Miracle", it may not challenge the constitutionality of the statute, under which the license was obtained. The license, it will be recalled, was revoked by the Regents on the ground that the grant was illegal and void (R. 54, 162). The constitutional issues were timely raised, and were determined on the merits by the state courts (R. 7, 89, 156).

The doctrine of estoppel rests on the equitable principle that one may not receive and retain the benefits of an Act while attacking its validity. *Fahey* v. *Mallonee*, 332 U. S. 245, 255. The doctrine cannot be applied here for the challenged statute does not confer a benefit, but limits a right. Moreover, even if the statute did confer a benefit, it cannot be said that the benefit was *retained* in this case.

The Regents rely on *Ashwander* v. *Valley Authority*, 297 U. S. 288, and *Fahey* v. *Mallonee*, 332 U. S. 245, to support their contention that Appellant may not contest the validity of the statute. Neither case is applicable. The determination in *Fahey* v. *Mallonee, supra*, was that an Association (or its members) had no standing to attack the validity of an Act upon which its existence depended. The reference in the Regents' brief to *Ashwander* v. *Valley Authority*, 297 U. S. 288, 349, is merely to dictum in a concurring opinion. The majority of the court ruled that the plaintiffs in that case were *not* estopped from challenging the validity of a

statute merely because they had relied upon its validity and received certain benefits under the statute in the past. Mr. Chief Justice Hughes, writing for the court, stated (297 U. S. 323): "The principle is invoked that one who accepts the benefit of a statute cannot be heard to question its constitutionality . . . We think that the principle is not applicable here . . ."

The contention that Appellant, because it secured a license for "The Miracle", is estopped from denying the validity of the statute requiring such license, is without merit. The license was rescinded on the ground that its issuance in the first instance was improper. Appellant was thus placed in the position of one who had never received a license for the picture. "One who is willing to obey a statute and invoke its provisions by applying thereunder for a license to do business is quite free, when his application is denied, to enjoin the operation of the statute on the ground that it may not constitutionally require any license at all." *Buck* v. *Kuykendall*, 267 U. S. 307, 316. See also *O'Brien* v. *Wheelock*, 184 U. S. 450; 489; *Union Pacific R. R. Co.* v. *Pub. Service Comm.*, 248 U. S. 67, 69; *Abie State Bank* v. *Bryan*, 282 U. S. 765, 776; *Bacardi Corp.* v. *Domenech*, 311 U. S. 150, 166. If the Regents' contention is valid, the Distributor's only means of testing the constitutionality of the statute (it having been in existence many years) would be to ignore its provisions, exhibit the film without license, and risk criminal prosecution.

Even if the license for "The Miracle" had been retained, the Distributor would not be estopped from challenging the constitutionality of the law. *Union Pacific R. R. Co.* v. *Pub. Service Comm.*, 248 U. S. 67. The *Union Pacific* case involved a statute that prohibited the issuance of mortgage bonds unless a certificate authorizing the issue was obtained

from the Public Service Commission. The plaintiff applied for and secured a certificate, issued its bonds, and then sued to recover the charge made for the certificate on the ground that the statute unlawfully interfered with interstate commerce. The Commission argued that the plaintiff, having voluntarily secured and having made use of the certificate, was precluded from challenging the validity of the law under which it was granted. Mr. Justice Holmes, speaking for the court, said in dismissing that contention (248, U. S. at p. 70), "The certificate was a commercial necessity for the issue of the bonds. The statutes if applicable purported to invalidate the bonds and threatened grave difficulties if the certificate was not obtained. The Railway Company and its officials were not bound to take the risk of these threats being verified. Of course it was in the interest of the Company to get the certificate. It is always for the interest of the party under duress to choose the lesser of two evils."

If, as Appellees now state, the Distributor has no standing to raise the constitutional issues, it is difficult to understand the Appellees' failure to file a statement in opposition to jurisdiction, or to move to dismiss this appeal before probable jursidiction was noted.

Respectfully submitted,

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